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Tekweld Solutions, Inc. and Warehouse Production Sales and Allied Service Employees Union, Local 811. Case 29–CA–138172

January 22, 2015

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND JOHNSON

This is a refusal-to-bargain case in which the Respondent is contesting the Union’s certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed by Warehouse Production Sales and Allied Service Employees Union, Local 811 (the Union) on October 6, 2014, the General Counsel issued the complaint on November 10, 2014, alleging that Tekweld Solutions, Inc. (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union’s request to recognize and bargain following the Union’s certification in Case 29–RC–099621.¹ (Official notice is taken of the “record” in the representation proceeding as defined in the Board’s Rules and Regulations, Secs. 102.68 and 102.69(g). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On November 20, 2014, the General Counsel filed a Motion for Summary Judgment. On November 25, 2014, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response, and the General Counsel filed a reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the certification on the basis of its position that the Acting Regional Director abused his discretion in his report recommending disposition of determinative challenged ballots.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We

therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.²

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a domestic corporation, with its principal office and place of business located at 180 Central Avenue, Farmingdale, New York, has been engaged in the wholesale distribution of promotional products.

During the year preceding issuance of the complaint, which period is representative of its annual operations generally, the Respondent, in the course and conduct of its business operations, has derived gross revenues in excess of \$50,000 from the performance of services to clients located outside the State of New York.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on November 19, 2013, the Union was certified on September 8, 2014, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

Included: All full-time and regular part-time printing department employees, packaging, labeling, bottle capping, warehouse employees, shipping, receiving, machine operators, and production employees at the Respondent’s 180 Central Avenue, Farmingdale, New York location.

Excluded: All clerical employees, sales personnel, guards and supervisors as defined by Section 2(11) of the Act.

¹ 361 NLRB No. 18 (2014).

² Member Miscimarra dissented in part from the Board’s Decision and Direction in the underlying representation proceeding reported at 361 NLRB No. 18 (2014). He would have established a new eligibility date and directed a new election. While Member Miscimarra remains of that view, he agrees that the Respondent has not presented any new matters that are properly litigable in this unfair labor practice case. See *Pittsburgh Plate Glass Co. v. NLRB*, supra. In light of this, and for institutional reasons, Member Miscimarra agrees with the decision to grant the Motion for Summary Judgment.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

By letters dated September 9 and 25, 2014, the Union requested that the Respondent meet and bargain with it as the exclusive collective-bargaining representative of the unit employees and, since September 9, 2014, the Respondent has refused to do so.

We find that this failure and refusal constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since September 9, 2014, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord: *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964).

In addition to the customary notice posting remedies, the General Counsel requests the additional remedy that the Respondent mail a notice to each unit employee's residence. In the absence of any explanation why the notice mailing remedy is warranted here, we deny the General Counsel's request.

ORDER

The National Labor Relations Board orders that the Respondent, Tekweld Solutions, Inc., Farmingdale, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Warehouse Production Sales and Allied Service Employ-

ees Union, Local 811 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

Included: All full-time and regular part-time printing department employees, packaging, labeling, bottle capping, warehouse employees, shipping, receiving, machine operators, and production employees at the Respondent's 180 Central Avenue, Farmingdale, New York location.

Excluded: All clerical employees, sales personnel, guards and supervisors as defined by Section 2(11) of the Act.

(b) Within 14 days after service by the Region, post at its facility in Farmingdale, New York, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 9, 2014.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certifi-

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

cation of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 22, 2015

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Warehouse Production Sales and Allied Service Employees Union, Local 811 (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

Included: All full-time and regular part-time printing department employees, packaging, labeling, bottle capping, warehouse employees, shipping, receiving, machine operators, and production employees at our 180 Central Avenue, Farmingdale, New York location.

Excluded: All clerical employees, sales personnel, guards and supervisors as defined by Section 2(11) of the Act.

TEKWELD SOLUTIONS, INC.

The Board's decision can be found at www.nlrb.gov/case/29-CA-138172 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

